

Editor's note: 94 I.D. 69; **Appealed -- reversed, sub nom. Chevron U.S.A., Inc. v. U.S.,** (appeals also filed by 6 other oil companies) No. 350-87 L (Ct.Cl. July 24, 1989), 17 Cl. Ct. 537; **final judgment entered** (Dec. 5, 1989); **rev'd remanded to Cl.Ct., No. 90-5053** (Fed. Cir. Jan. 16, 1991), 923 F.2d 830; **petition for rehearing en banc denied**, (Apr. 14, 1991), **dismissed**, (Cl. Ct. Aug. 12, 1991), 23 Cl. Ct. 703; **cert denied, sub nom. Phillips Petroleum v. U.S.** No. 91-1 (S.Ct. Oct 7, 1991), **cert denied, sub nom. Pennzoil Co. v. U.S.** No. 91-34 (S.Ct. Oct. 7, 1991) 112 S.Ct. 167

SHELL OFFSHORE, INC.

IBLA 85-282 through 85-297

Decided March 17, 1987, Decided

PAGE Appeal from a decision of the Minerals

Management Service denying Federal Energy Regulatory Commission order Nos. 93 and 93-A refund requests.

Affirmed in part; reversed in part.

1. Outer Continental Shelf Lands Act: Refunds

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), confers authority upon the Secretary of the Interior to approve refunds for overpayments arising from outer continental shelf leases and also authorizes the Secretary of the Treasury to make the payments.

2. Outer Continental Shelf Lands Act: Refunds

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), permits requests for refunds only within 2 years of the date payment is received by the appropriate office.

3. Administrative Procedure: Administrative Procedure Act --
Regulations: Force and Effect as Law

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). It must be based on a grant of power by Congress and be promulgated in accordance with the requirements of the Administrative Procedure Act.

4. Administrative Procedure: Administrative Procedure Act --
Regulations: Force and Effect as Law

If a rule is substantive, it must be promulgated in accordance with the Administrative Procedure Act in order to have the force and effect of law. If, however, a rule is interpretive, the same proposition is true. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979).

5. Outer Continental Shelf Lands Act: Refunds

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), requires requests for refunds be in writing, but does not specify the form the writing must take or its substantive contents. Requests arising after the date this opinion issues should be in writing, identify the claimant, the lease affected, and the reasons a refund is sought.

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OPINION BY ADMINISTRATIVE JUDGE ARNESS

This is a consolidated decision of 16 appeals 1/ brought by oil and gas producing companies which hold leases issued under the Outer Continental

1/ The appellants, case numbers, and Minerals Management Service (MMS) file numbers of the appeals consolidated in this decision are:

IBLA 85-282	Shell Offshore, Inc.	MMS-84-0039-OCS
IBLA 85-283	Cities Service Oil and Gas Corp., et al.	MMS-84-0040-OCS
IBLA 85-284	Pogo Producing Company	MMS-84-0041-OCS
IBLA 85-285	Exxon Company, U.S.A.	MMS-84-0042-OCS
IBLA 85-286	Tenneco Oil Company, et al.	MMS-84-0043-OCS
IBLA 85-287	Pennzoil Oil & Gas, Inc., et al.	MMS-84-0044-OCS
IBLA 85-288	Amoco Production Company	MMS-84-0045-OCS
IBLA 85-289	American Petroleum Institute	MMS-84-0046-OCS
IBLA 85-290	Chevron U.S.A., Inc.	MMS-84-0051-OCS
IBLA 85-291	Gulf Oil Corporation	MMS-84-0074-OCS
IBLA 85-292	Columbia Gas Development Corp.	MMS-84-0075-OCS
IBLA 85-293	Mobil Oil Corp., et al.	MMS-84-0076-OCS
IBLA 85-294	Conoco, Inc.	MMS-84-0077-OCS
IBLA 85-295	Union Oil Company of California	MMS-84-0078-OCS
IBLA 85-296	Aminoil, Inc.	MMS-84-0079-OCS
IBLA 85-297	Phillips Petroleum Company	MMS-85-0001-OCS

By order of Feb. 7, 1985, these 16 appeals were consolidated with the appeal of Texaco, Inc., IBLA 85-281. On Apr. 5, 1985, Texaco, Inc., and the MMS entered into a Stipulation of Dismissal, and by order dated Apr. 15, 1985, IBLA 85-281 was segregated from the consolidated cases and dismissed with prejudice.

By order of Aug. 15, 1985, the appeal of Conoco Oil Co., Inc., IBLA 85-748, from a May 30, 1985, decision of the Director, MMS, denying royalty refund requests resulting from FPC opinion No. 598, was consolidated with similar cases for the purposes of briefing and decision. By order of Sept. 13, 1985, the appeals of Chevron U.S.A., Inc., and Gulf Exploration

Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1982). 2/ Pursuant to the Act, lessees are required to pay a royalty of not less than 12-1/2 percent of the "amount or value of the production saved, removed or sold" as fixed by the Secretary of the Interior. Id. § 1337(a). MMS carries out the duty of the Secretary to establish the value of production. Included in the factors considered in establishing the value is the regulated price. 30 CFR 206.150. The regulated price of natural gas is set by the Federal Energy Regulatory Commission (FERC) acting under authority of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1982), and the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3432 (1982).

I.

The appeals under consideration arise from a "final order" issued by MMS November 23, 1984, which, among other things, denied "all FERC Orders 93/93A refund requests which seek refunds of royalty payments made before November 9, 1981 on Federal Outer Continental Shelf (OCS) leases." 49 FR 47120 (Nov. 30, 1984). The denial was "based on the 2-year statute of limitations for royalty

refund requests mandated by section 10 of the Outer _____
fn. 1 (continued)

and Production Company, IBLA 85-795, Shell Offshore, Inc., IBLA 85-796, and Kerr-McGee Corp., IBLA 85-797, were also consolidated for the purposes of briefing and decision. Although the consolidated cases raise a common issue of law, because those consolidated by the subsequent orders arise from different procedural and factual backgrounds, they will be ruled upon in a separate opinion. 2/ The current statutes derived from the OCSLA, P.L. 212, 67 Stat. 462, and the OCSLA Amendments of 1978, P.L. 95-373, 92 Stat. 629.

Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1339(a)." The order stated that it did not apply "to any lessee who filed a proper notice with MMS which tolled the 2-year statute."

FERC Order No. 93 established final rules applying to the sale of natural gas regulated under the NGPA. 45 FR 49077 (July 22, 1980). ^{3/} Among the regulations promulgated was section 270.204 which established standard conditions for measuring the energy (Btu) content of natural gas for the purpose of determining its first sale ceiling price. Previously published interim rules had specified, as had regulations issued under the Natural Gas Act, that the measurement was to be made on gas "saturated with water vapor." 43 FR 56448, 56550 (Dec. 1, 1978); cf. 18 CFR 2.56a(c)(1)(iii), 2.56b(d)(1). The final rules retained this phrase, but the preface noted that the results obtained "must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas." 45 FR 49080 (July 22, 1980). The preface also stated that section 207.204 was effective 30 days from the date of issuance. Id. at 49081.

After issuing Order No. 93, FERC received a number of applications for rehearing, primarily from oil and gas pipeline and distribution companies. FERC denied the applications for rehearing but granted requests for clarification by Order No. 93-A. 46 FR 24537 (May 1, 1981). Included in the

^{3/} Because we are concerned only with the effect of FERC's rules on royalty payments made to MMW, we do not discuss the FERC's orders and their subsequent history in full detail. A more complete explanation may be found in Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F.2d 1 (D.C.Cir. 1983), cert. denied, 465 U.S. 1108 (1984).

discussion of the effective date of Order No. 93 was the statement: "Because Order No. 93 is but a clarification of the interim rule, it is effective for all first sales of natural gas made on or after December 1, 1978, the effective date of the interim rule." 46 FR 24543. Additional petitions for rehearing were filed with FERC and further administrative proceedings not of consequence here ensued. The outcome was that FERC issued an order reaffirming the December 1, 1978, effective date and adding a new subsection (c) to section 270.204. 47 FR 614 (Jan. 6, 1982). It stated: "The maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale." Id. at 615.

Although the history of FERC's orders appears to be concerned with little more than a regulatory definition, the consequences of the definition are significant. The Btu content of natural gas varies with the mixture of various combustible hydrocarbons it contains and also with its noncombustible ingredients, including water vapor. Measuring the Btu content of a sample of gas "saturated with water vapor" (commonly referred to as "the wet rule") tends to understate the actual Btu content of the gas from which the sample was taken because water is added to reach the saturation point. Since the NGPA requires that maximum first sale prices be set in terms of "per million Btu," see 15 U.S.C. §§ 3318, 3319 (1982), the understated energy content lowers the price paid by pipeline and distribution companies to gas producers. Conversely, the language of the preface to the final regulations and subsequently adopted section 207.204(c) requiring adjustment of prices for the energy content of gas "actually delivered" (referred to as "the dry rule")

raises the price paid to producers. Although the difference in the Btu content of gas measured under the wet and dry rules is usually small ^{4/} and the corresponding price difference minimal, given the large volumes of natural gas normally flowing from producers to pipeline and distribution companies, the difference quickly becomes measured in millions of dollars.

Aware of the significant effect of the dry rule, particularly the potential liability for additional royalties on gas purchased prior to the issuance of Order No. 93-A, gas pipeline and distribution companies sought judicial review of FERC's orders. In Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F.2d 1 (D.C. Cir. 1983), the court found FERC's "dry rule to be inconsistent with the NGPA's language, structure, and legislative history," and "fundamentally at odds with the Btu measurement technique implicit in the NGPA." Id. at 14-15. Accordingly it vacated the "measurement of Btu content established in section 270.204." Id. at 16. The United States Supreme Court denied certiorari on March 19, 1984. 465 U.S. at 1108 (1984).

The significance of the content and history of FERC Orders Nos. 93 and 93-A for the present case is that they were used by MMS in calculating the value of production and consequently the royalties due on gas produced from leases held by appellants. Just as the higher Btu content resulting from measurements made using the dry rule would raise the maximum selling price

^{4/} The effect of the wet rule was to raise the heating value of gas sold by up to 1.74 percent. Sharples & Pannill, "Calculation of Gas Heating Value is Complicated by the Courts." Oil & Gas Journal 47 (July 2, 1984).

producers could charge under the NGPA, so also it raised the amount of royalties due MMS.

Conversely, recalculation of royalties due MMS under the wet rule will result in lower royalties due for gas produced or sold beginning December 1, 1978, and a refund to the producers. The consequence of MMS' final order under appeal is to deny refunds for royalty payments made prior to November 9, 1981, except for lessees who filed "proper notice."

II.

After receiving a number of requests for refunds from producers, on November 9, 1983, MMS issued a letter stating that because a final decision had not been rendered in the litigation, it would not accept "refund adjustments." See 49 FR 31779 (Aug. 8, 1984). The letter stated that FERC was seeking authority from the Department of Justice to file for certiorari and that MMS would establish "procedures for claiming refunds in the event that the lower court ruling is upheld." Id. It also advised producers who had "included FERC 93 or 93-A refund adjustments in prior MMS-2014 reports" to reverse the adjustments in their next monthly report. Id.

A month after the Supreme Court denied certiorari, MMS published procedures for applying for refunds. 49 FR 17824 (Apr. 25, 1984). Applicants were told to submit detailed information and documentation supporting their claims for refunds and, after receiving approval, submit revised MMS-2014's. Of importance to the present appeal, the instructions required a "showing that the payment for which a refund or credit is sought was made within 2

years of the request," and referred applicants to a Solicitor's opinion. See Solicitor's Opinion, "Refunds and Credits Under the Outer Continental Shelf Lands Act," 88 I.D. 1090 (1981) (hereinafter Solicitor Op.).

Over 3 months later MMS published revisions to its instructions, changing the information producers were to supply in applying for refunds and giving notice that MMS review would be conducted by audit procedures. 49 FR 31779 (Aug. 8, 1984). In a section entitled "Tolling Periods" MMS found

the 2-year statute of limitations mandated in section 10 of the Outer Continental Shelf Lands Act (OCSLA) was tolled for all payors on November 9, 1983, with a letter to all payors (see appendix below). For payors who submitted requests prior to that date that met the requirements of a section 10 claim under the OCSLA, the statute of limitations will be tolled as of the date the DOI [Department of the Interior] received the payor's request.

The Solicitor's opinion was again cited. The notice also set, based on a recently published FERC rule, separate dates for "the end of the tolling period" for large and small producers. 5/ Finally, noting that some producers

5/ The FERC publication referred to by MMS was notice of an interim rule under which FERC ordered large producers to make refunds to pipeline companies within 6 months and small producers to make refunds within a year. 49 FR 19293 (May 7, 1984). A producer was classified as large or small depending upon whether it had "sold a total of ten million Mcf (10 Bcf) or less of gas in both the intrastate and interstate markets in 1983." Id. at 19295. Using the times set by FERC, MMS stated that the end of the tolling period was Nov. 3, 1984, for large producers and May 3, 1985, for small producers.

FERC's interim rule led to issuance of a final rule as Order No. 399. 49 FR 37735 (Sept. 26, 1984). Petitions for rehearing led FERC to stay the order and extend the deadline for refunds pending rehearing. 49 FR 43543 (Oct. 30, 1984). As a result of the petitions on rehearing, FERC revised its order by Order No. 399-A. 49 FR 46353 (Nov. 26, 1984). It also extended the deadline for large producers to Dec. 31, 1984. These orders were reviewed by

had reduced their royalty payments by the amounts they claimed due as refunds, MMS ordered them to pay the amounts deducted within 60 days, and stated that failure to do so "will be considered to be done knowingly and willfully," citing 30 U.S.C. § 1719(c)(1) (1982) and 43 U.S.C. § 1350(c) (1982).

Four months after publishing its revised instructions MMS issued the "final order" which is the subject of the present appeal. 49 FR 47120 (Nov. 30, 1984). It stated that MMS had received appeals from its August 8, 1984, notice establishing refund procedures, but that the agency did not regard the notice "as a final order from which an appeal may be taken." Accordingly, MMS dismissed the appeals it had received as "procedurally defective," but stated that the current "final order" could be appealed to this Board. As previously described, MMS then denied refund requests for royalty payments made before November 9, 1981. It noted that the order did not apply to lessees "who filed a proper notice with MMS which tolled the 2-year statute." "In order to have tolled the statute," MMS went on to state, "a payor must have given written notice to the Department of the challenge and of the approximate difference in amount should the challenge succeed," again citing the Solicitor's opinion. Finally, again based on FERC actions, 6/ MMS extended the "tolling period" for large producers, but

fn. 5 (continued)

the Court of Appeals for the District of Columbia over the issue of offsets which is not relevant in the present case. See Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 756 F.2d 166 (D.C. Cir. 1985). 6/ 49 FR 43543 (Oct. 30, 1984); see note 5 supra.

noted that the extension and the "revisions of refund criteria are not final orders for purposes of appeal."

III.

The central issue for decision in this appeal is whether MMS was correct in finding that 43 U.S.C. § 1339(a) (1982) precludes requests for refunds of royalty payments made prior to November 9, 1981. As discussed below, this issue involves questions about the application of the statute and its requirements for making refund requests.

In relevant part, 43 U.S.C. § 1339(a) (1982) provides:

[W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after making of the payment * * *.

In general, appellants focus on the portion of the statute regarding payments "in excess of the amount * * * lawfully required to pay." They argue that their royalty payments were lawfully required at the time they were made and did not become excess until the Supreme Court denied certiorari in the Interstate case on March 19, 1984. For this reason, they assert, it was not possible to file for a refund within 2 years of the actual date of payment because no refund was due until the Supreme Court's order. Indeed, some appellants state it was contrary to their interest to object because they

received more for their production under the dry rule. In fact, numerous producers, including some of the present appellants, intervened in support of the orders in the litigation brought against FERC. For these and other reasons, they conclude that this Board should find the 2-year period provided by the statute did not begin to run until the date of accrual of their right to a refund.

Appellants also raise other arguments. Several point to various events which they contend tolled the statute either for all producers or for their own leases. Some contend that MMS's exclusion of their claims is a taking of their property in violation of the fundamental fairness requirements of the due process clause of the Fifth Amendment. A number of appellants also object to the manner in which MMS issued its notices, claiming violations of the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (1982).

In its answer, MMS focuses on the portion of the statute allowing repayment "if a request for repayment * * * is filed * * * within two years after the making of the payment." It argues that under this language the 2-year period begins when payment is tendered and that the act has the effect of barring requests made once the 2-year period has run. In reply to appellants, MMS points out that they could have notified the Department of the refunds which would be due had the challenge to the FERC orders succeeded. MMS acknowledges that its letter of November 9, 1983, tolled the statute, but

denies that either administrative or judicial review of the FERC orders had the same effect.

In presenting their arguments the parties cite and discuss the Solicitor's opinion referred to in MMS's notices as well as other administrative interpretations of similar statutes. The parties also argue about the applicability of this Board's decision in Phillips Petroleum Co., 39 IBLA 393 (1979), and, to a lesser extent, Shell Oil Co., 52 IBLA 74 (1981). No court has addressed the application of the statute in detail. ^{7/} In considering the parties' arguments the Board has reviewed the Solicitor's opinion and examined OCSLA's legislative history.

IV.

[1] Section 1339 confers authority upon the Secretary of the Interior to approve refunds for overpayments made in regard to OCS leases and also authorizes the Secretary of the Treasury to make the payments. More precisely, it states that when the Secretary of the Interior is satisfied that an OCSLA lessee has made a payment "in excess of the amount he was lawfully required to pay," the excess "shall be repaid" if a request is filed "within two years after the making of the payment."

Such a statute as this is needed because the United States Constitution prohibits drawing from the U.S. Treasury "but in Consequence of Appropriations

^{7/} See Pennzoil Offshore Gas Operators, Inc. v. Federal Power Commission, 560 F.2d 1217, 1221 n.8 (5th Cir. 1977); Placid Oil Co. v. United States Department of the Interior, 491 F. Supp. 895, 900 (N.D. Tex. 1980).

made by law." U.S. Const. art. I, § 9, cl. 7; see Reeside v. Walker, 52 U.S. (11 Howard) 272 (1851); Stizel-Weller Distillery v. Wickard, 118 F.2d 19 (D.C. Cir. 1941). OCSLA requires that all sums paid on leases be deposited in the Treasury. 43 U.S.C. § 1338 (1982). Thus, absent express authority, the Secretary would be unable to order repayment of OCSLA funds deposited in the Treasury. The Department has recognized the constitutional requirement on numerous occasions. See Solicitor Op., supra at 1093 and cases cited in notes 3 and 4.

In Phillips Petroleum Co., supra at 398, the Board recognized that one purpose of section 1339 is "to require lessees to promptly verify their accounts and ascertain the correctness of payments made within the time provided." Unfortunately, the legislative history of section 1339 reveals little else about its purpose other than to meet the obvious administrative need to provide authority to make refunds. While OCSLA's financial provisions generated considerable controversy, the debate focused more on Federal aid to education and the need to repay the national debt (proposed purposes to which income from leases would be dedicated) than the scope of the Secretary's refund authority. The summary sections of the relevant committee reports tend to paraphrase the statute rather than elucidate it. See, e.g., H. Rep. No. 413, 83d Cong., 1st Sess., reprinted in U.S. Code Cong. & Ad. News 2177, 2182 (1953). The most helpful comment appears in the section of the Senate committee report discussing committee amendments. It states: "Section 10, providing for refunds is similar to provisions of Federal mineral leasing laws, with the additional requirement of notice to Congress in advance of repayment." S. Rep. No. 411, 83d Cong., 1st Sess. 26 (1953).

At the time OCSLA was enacted, Secretarial authority to refund payments made under the mineral leasing laws was provided by 43 U.S.C. § 98a (1954) (Act of June 27, 1930, ch. 642, 46 Stat. 822). ^{8/} This statute made the Act of December 11, 1919, ch. 5, 41 Stat. 366, "applicable to all payments in excess of lawful requirements." It was enacted in 1930 after the Comptroller General determined that existing statutes did not apply to mineral lease payments because the mineral leasing laws were not "public land laws." Dec. Comp. Gen. A-28366 (Sept. 5, 1929); cf. Udall v. Tallman, 380 U.S. 1, 19, reh'g denied, 380 U.S. 989 (1965). The 1919 Act permitted refunds under two provisions. First, for applications "to make any filing, location, selection, entry or proof" the Act permitted repayment of "purchase moneys and commissions" if a request was made "within two years from the rejection of such application." 41 Stat. 366 (1919). Second, the Act provided that "in all cases" a person making a payment "under the public land laws in excess of the amount he was lawfully required to pay" would be repaid provided he "file[d] a request for the repayment of such excess within two years after the patent has issued for the land embraced in such payment." Id. No change in wording was made by Congress in extending the statute to mineral leases. See 46 Stat. 822 (1930).

The chief reason for enacting the 1919 legislation was that the existing statutes did not provide a time limitation for filing for refunds. See Act

^{8/} The statutes in effect were repealed by the Public Land Administration Act which contained a provision authorizing refunds. P.L. 86-649, § 204, 74 Stat. 506, 507 (1960) (codified at 43 U.S.C. § 1374 (1970)). This statute was in turn repealed by section 705(a) of the Federal Land Policy and Management Act of 1976, P.O. 94-579, 90 Stat. 2743, 2792-2793. The current statute is found at 43 U.S.C. § 1734(c) (1982).

of March 26, 1908, ch. 102, 35 Stat. 48. It appears that a time limitation was deemed necessary because enterprising lawyers were searching Departmental records to find unrefunded payments and applying for refunds on behalf of those entitled to them, frequently many years after the event which gave rise to a claim. See Solicitor Op., supra at 1097-98 (quoting House debate).

Comparison of section 1339 with its predecessor reveals that the language relied on by appellants ("lawfully required to pay") was adopted unchanged while the language relied upon by MMS ("two years after the making of the payment") was substituted for the reference to the issuance of a patent. While this change received some attention at the time, see S. Rep. No. 411, 83d Cong., 1st Sess. 37 (1953) (report of Department of the Interior) and 99 Cong. Rec. 10474 (July 30, 1953) (amendment), a review of the legislative history does not disclose that the change was intended to do more than substitute a term appropriate to mineral leasing. Nevertheless, as the present case dramatically points out, the change was significant.

The earlier statute used the date a patent issues as the date the statutory 2-year period began to run. Issuance of a patent is the final action of the Department on a public land entry and transfers title from the United States to the patentee. Smelting Co. v. Kemp, 104 U.S. 636 (1881). Until this event occurs, the land remains under the jurisdiction of the Department and the entry may be reviewed and cancelled. Cameron v. United States, 252 U.S. 450, 460 (1920); Kirk v. Olson, 245 U.S. 225 (1917); Hawley v. Diller, 178 U.S. 476, 488 (1900). For this reason, until a patent is issued (or the entry cancelled) it is not possible to determine whether a refund is due or, if so, its amount. Thus, the earlier statute based its

time period on an event which necessarily corresponded to the date of accrual of a right to a refund. Cf. 20 Dec. Comp. Gen. 734, 736 (1941) (quoting letter from Secretary of the Interior).

[2] The wording "making of the payment" in section 1339, as the present case makes abundantly clear, does not identify an event which necessarily coincides with the event by which a right to a refund accrues. While Congress may have intended to merely substitute an equivalent term appropriate to the OCS leasing system in order to grant the Secretary sufficient authority to handle refunds, the language chosen was not adequate for the purpose. The statute conditions the authority of the Secretary to make repayment upon a request being filed "within two years after the making of the payment." A payment is made when it is tendered to the appropriate agency. William E. Phalen, 85 IBLA 151 (1985); Mobil Oil Corp., 35 IBLA 265 (1978). There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because the appellants may for other reasons appear to deserve refunds. See 2A Sutherland, Statutes and Statutory Construction § 46.01 (4th ed., rev. 1984).

Nor does the 1941 opinion of the Comptroller General require a contrary conclusion. The problem the Comptroller General confronted was that Congress, in extending existing statutes to mineral leasing, also extended them to grazing leases by its use of the term "leases," but grazing leases did not fall clearly within the language of the earlier statutes. The procedures by which grazing leases were issued did not involve the payment of "purchase moneys and commissions," the rejection of an "application, entry or proof,"

or the issuance of a patent. See 20 Dec. Comp. Gen. 734, 735-36 (1941). Thus, the intent of Congress to permit refunds of amounts paid for grazing leases created an ambiguity in the earlier statutes requiring interpretation to bring them within the scope of the 1930 legislation. In contrast, the wording chosen by Congress in enacting section 1339 is not ambiguous.

Because 43 U.S.C. § 1339 (1982) constitutes a grant of administrative authority, it is necessary to reject appellants' arguments that their 2-year period did not begin until they were aware a refund was due. The refunds at issue did not become due because of the Interstate ruling. Payments made by producers under the dry rule were always in excess of the lawful amount; the circuit court decision merely confirmed this fact. MMS is correct that, as the plain language of the statute indicates, the 2-year period for requesting refunds begins with the date of "the making of the payment." Accordingly, we affirm the result reached in Phillips Petroleum Co., supra, that under the statute a right to a refund must be asserted within 2 years of the date of payment.

Although repayment by the Secretary of the full amount of refunds sought by appellants to is not possible under section 1339, this conclusion does not foreclose other remedies which may be available to them. In this regard, the Solicitor's opinion erred in applying Departmental interpretations of the 1919 refund statutes to section 1339. The Solicitor stated: "The Department interprets the limitation to be 'obviously against the claim and not merely against the remedy.'" The language quoted appeared in instructions issued by the Department, 49 L.D. 541, 544 (1923), and was quoted in a later decision, Anthony, Legal Representatives of Middlebrook (On Rehearing).

51 L.D. 333, 335 (1926). While the statement may have been a correct interpretation of the 1919 Act because its time limitations ran from a date corresponding to the date a refund was due, such is not the case with section 1339. If applied to section 1339 and the present case, such an interpretation would dictate a finding that some of appellants' overpayment claims were extinguished prior to the date their payments became refundable following the circuit court's decision. Accordingly, section 1339 does not operate to extinguish any claims appellants may have. Nevertheless, as a practical matter, appellants may have little recourse but to petition Congress for relief.

V.

Next, the issue of the manner of making "a request for repayment" under section 1339 should be considered. Appellants raise both general and specific arguments as to the manner in which MMS has handled requests for refunds and issued the notices described in Part II. In general, they contend the notices impose substantive and procedural rules without benefit of the rulemaking procedures mandated by the APA. See 5 U.S.C. § 553 (1982). For this reason, they maintain the notices, particularly the "final order," are invalid. Appellants' specific arguments concern several matters stated in the notices. They object to the dismissal of their appeals as "procedurally defective" in the notice of August 8, 1984, and point out that MMS nevertheless addressed the substance of the arguments raised in those appeals. They argue that the "tolling" determination under which MMS denied refund requests for payments made prior to November 9, 1981, is a substantive rule affecting their right

to obtain refunds. They also object to the use of notices to establish the specific information which must be submitted to MMS to obtain a refund.

An additional point raised by appellants is both part of their general argument and a specific objection. As was previously observed, MMS's notices referred to a Solicitor's opinion in regard to the 2-year time period for requests made under section 1339, and its "final order" again referred to the opinion in stating its decision did not apply "to any lessee who filed a proper notice with MMS which tolled the 2-year statute." 49 FR 47120 (Nov. 30, 1984). Appellants argue that through these references MMS has imposed a substantive requirement regarding requests for refunds without proper rulemaking under the APA. They point out that a Solicitor's opinion is simply a legal opinion given by the Solicitor to the Secretary and argue that the standards it states are not derived from the statute. Nevertheless, they claim, MMS is applying the standard established by the Solicitor not only to their requests but also to all refund requests made to MMS. They additionally argue that the standards so set cannot be applied without publication in the Federal Register as required by 5 U.S.C. § 552(a) (1982).

To substantiate their arguments, several appellants have submitted copies of documents which they maintain constitute valid requests to the agency. For example, by letter dated September 3, 1983, Union Oil Company of California submitted to MMS reports for payment of its royalties due and enclosed a "Notice to Interest Owners." ^{9/} The letter also asserted

^{9/} The notice stated:

"The United States Court of Appeals for the District of Columbia Circuit (D.C. Court) issued a decision on August 9, 1983, vacating certain regulations established by the Federal Energy Regulatory Commission in Order

Union's position that the notice met the statute's 2-year requirement. The Union notice referred to the circuit court ruling and noted that it would result in a lower maximum lawful price of under 2 percent. Contingent upon the circuit court decision being upheld, it also asserted Union's intent to recover "excess amounts previously paid to you." By letter dated December 28, 1983, Union sent a copy of the notice to MMS, again asserting that it met the 2-year requirement. By letter dated March 14, 1984, MMS replied that the notice did not meet the 2-year requirement of the statute "as it does not contain the data requested in paragraph three below." The third paragraph of the letter stated in part:

To satisfy the legal basis for tolling the Section 10 Statute of Limitations your refund request should contain; (1) an estimate of the amount of refund requested, (2) the basis for the refund, and (3) the time period involved. This data must be presented in sufficient detail to allow MMS to substantiate your request.

MMS has responded by arguing that its final order is not a rule as defined by the APA, and that even if it is, it is an interpretive rule excepted from notice and comment rulemaking under 5 U.S.C. § 553(b)(A) (1982).

fn. 9 (continued)

No. 93 and Order No. 93-A. The D.C. Court's ruling, in effect, provides for a maximum lawful price slightly lower (under 2%) than that allowed pursuant to the above-mentioned Orders. Union Oil Company of California (Union) is in the process of appealing this decision.

"Union accounts to its royalty interest owners and other interest owners on the basis of actual proceeds received by Union. Subsequent to the issuance of Orders Nos. 93 and 93-A, some pipeline purchasers made additional payments in accordance therewith while other pipelines refused to make payments in accordance therewith until such time as a final non-appealable decision was reached on such issue.

"In the event that the D.C. Court's decision is upheld and only to the extent that Union is compelled to make a refund to your pipeline purchaser, Union will recover from you any excess amounts previously paid to you, plus any interest thereon, which Union is legally required to refund and which is attributable to your interest."

In relevant part the APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *." 5 U.S.C. § 551(4) (1982). Applying this definition, it is clear that through its notices MMS sought to establish rules governing refund requests. ^{10/} MMS, however, correctly argues that the APA makes exceptions from its rulemaking requirements for "interpretive rules." 5 U.S.C. § 553(b)(B) (1982). ^{11/} Traditionally, this exception has been treated as establishing a distinction between interpretive and substantive rules. The APA, however, does not define these terms and courts have made a variety of statements about the differences between the two types of rules. Of particular concern in judicial pronouncements has been the issue of whether the rule under review is binding on the court in the case before it.

[3] In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), Justice Rehnquist reviewed some of the Supreme Court's cases on the matter and outlined the steps under which judicial review proceeds. "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." Id. at 301. A substantive rule is one "'affecting individual rights and obligations.'"

^{10/} Although MMS asserts as a defense that its final order is not a rule, it offers no analysis or argument in support of this position. It does quote in a footnote the definition of "order" at 5 U.S.C. § 551(6) (1982).

^{11/} Section 553 provides two exceptions for interpretive rules. First, under subsection (b)(A) interpretive rules are excepted from the requirement to publish notice of proposed rulemaking. Second, under subsection (d) an exception is provided to the requirement that publication of a rule occur 30 days prior to its effective date.

Id. at 302 (quoting Morton v. Ruiz, 15 U.S. 199, 232 (1974)). Because the legislative power of the United States is vested in Congress, if a rule is substantive, it "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." Id. In addition,

the promulgation of these regulations must conform with any procedural requirements imposed by Congress. Morton v. Ruiz, supra, at 232. For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969). The pertinent procedural limitations in this case are those found in the APA.

Id. at 303.

[4] The Secretary of the Interior is given full authority to administer the provisions of OCSLA and to "prescribe such rules and regulations as may be necessary to carry out such provisions." 43 U.S.C. § 1334(a) (1982). MMS has not formally promulgated regulations governing refunds. See 30 CFR Part 230. Nevertheless, there is no need to determine whether MMS' notices constitute such rules and regulations within the authority of OCSLA or to delve into the complexities of the differences between substantive and interpretive rules and the concomitant questions about substantial impact. See generally 2 Davis, Administrative Law Treatise §§ 7.8 through 7.20 (2d ed. 1979 and Supp. 1982). If a rule is substantive, it must be promulgated in accordance with the APA in order to have the "force and effect of law." Chrysler Corp. v. Brown, supra. Nothing in the notices issued by MMS indicates that they were published pursuant to the notice and comment rulemaking procedures described by 5 U.S.C. § 553 (1982). Thus, they cannot have the

force and effect of law. The same is true if, on the other hand, the notices are interpretive rules. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." Id. at 315.

If the question presented was whether MMS had authority to determine what information it needed in order to process refund requests, as in its notice of April 8, 1984, it is unlikely we would have difficulty concluding that it has such authority. If the next question was whether MMS could publish a list of the necessary information in the Federal Register, we would agree that it can and point out that such publication may be required by 5 U.S.C. § 552(a) (1982). Similarly, it would seem apparent that MMS may determine that it does not need all the information it first thought necessary, modify its list, perhaps adding different information, and publish a notice, as MMS did in its notice of August 8, 1984. Whether these decisions are to be termed administrative matters, procedural determinations, or interpretive rules is generally of little consequence. They do not have the force and effect of law in the sense that substantive rights of parties cannot be affected. An application for a refund need not be approved until sufficient information has been supplied, but the rejection of an application would not prejudice the substantive rights of the applicant to obtain a refund. It would simply need to submit the information needed to support its request. Of course, such procedures cannot be administered in a manner that is otherwise not in accord with the law, but such issues are of no concern here.

The gravamen of appellants' complaints is that MMS has viewed its notices and the Solicitor's opinion as having substantive effect on appellants' claims to refunds. From the example of Union Oil Company's letter and notice it is clear that MMS views the standards drawn from the Solicitor's opinion as substantive requirements governing requests for refunds even though MMS's response failed to state why the company's submission was deemed insufficient. MMS's notices are not a substitute for promulgated regulations; nor can the Solicitor's opinion be given such weight. By its notices MMS announced the manner in which it would review, and has reviewed, requests for refunds, but neither its notices nor the Solicitor's opinion can limit the rights of parties or control review by this Board. See 43 CFR 4.1; Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp., 589 F.2d 658, 664-65 (D.C. Cir. 1978); Northern California Power Agency v. Morton, 396 F. Supp. 1187, 1191 (D.D.C. 1975), aff'd, 539 F.2d 243 (D.C. Cir. 1976). To the extent MMS has sought by the publication of its notices to impose substantive consequences upon appellants' claims to refunds, these determinations must be reexamined by the agency. Because MMS's final order did not address the specific requests raised by appellants, we do not consider these refund requests to be ripe for review. Since this matter must be remanded to MMS for further action, upon reconsideration by the agency and the issuance of specific decisions further appeal to this Board may be appropriate.

[5] Absent controlling regulations, the only standard which may be applied is that of the language of section 1339 itself. The Solicitor's opinion previously cited is correct in concluding that because section 1339

states a request is to be "filed," it must be made in writing. However, there is no language in the statute indicating the form the writing must take or specifying its substantive contents. The word "request" does not entail any substantive requirements. If Congress intended anything in adopting the term from the earlier statute, it is likely it had in mind overpayments resulting from computational errors and the use of estimates in making payments, and it assumed the Department would establish forms and promulgate procedures for supplying the accounting information necessary to obtain refunds. Cf. 43 CFR 217 (1949 and Supp. 1953). If Congress had wished, it could have written specific requirements into the statute. Instead, it appears to have left the matter to the Department and the only affirmative requirement indicated by the statute is that some form of written request is required. Undoubtedly, to be effective a request must in some manner inform MMS of the subject of the refund rather than merely stating "I want a refund;" however, the statute does not limit the form a request may take. While in the normal course of business notice would likely be given by letter, the statute does not specify a particular type of document. Thus, in reviewing appellants' cases, MMS should consider whether other documents received from lessees provided notice that the submitting party desired a refund. In addition, we find that there should be minimum requirements for making refund requests; future requests arising after the date this opinion issues should, at a minimum, be written, identify the claimant, the leases affected, and the reasons a refund is sought.

The notice necessary to meet the 2-year provision of the statute must be distinguished from the proof necessary to substantiate a request. MMS has administrative and fiscal responsibilities to assure itself that a refund is

permitted by law and that the applicant is in fact entitled to a refund. As stated in section 1339, MMS must be satisfied that a party has made payment "in excess of the amount he was lawfully required to pay." Clearly it is lawful to place on a claimant both the legal and evidentiary burdens of showing entitlement to a refund. It does not follow, however, that such a burden must be met at the outset by a request filed to meet the statute's 2-year limit. A request must timely notify MMS that a party seeks a refund. In contrast, proof of a valid claim must be sufficient to allow MMS to meet its responsibility to satisfy itself that a refund is due. As in the present case, such proof may ultimately require both resolution of legal issues and submission and review of detailed records on the payments made on production from numerous wells.

VI.

The Secretary's authority to administer the provisions of OCSLA and to "prescribe such rules and regulations as may be necessary to carry out such provisions," 43 U.S.C. § 1334(a) (1982), support the promulgation of regulations establishing procedures for filing refund requests. Fundamentally, it may be said, the present cases arise because MMS had not promulgated rules for filing notices and making applications for refunds. Nor has it since. Given the absence of any controlling regulations, it is necessary to specify the manner in which the parties should proceed upon remand. Because section 1339 states that requests must be filed "within two years after the making of the payment," it was clearly improper for MMS to attempt to prevent producers from filing refund requests by announcing it would not accept such requests. Apparently in recognition of the fact its letter of November 9, 1983, may

have prejudiced producers' rights, MMS sought to remedy its error by finding the letter had "tolled" the statute. While "tolling" was not the proper term to use, because MMS does not deny that the producers may obtain refunds for overpayments made on or after November 9, 1981, we will construe its letter as an acknowledgement of notice that as a result of the circuit court decision in Interstate all producers would seek refunds. Accordingly, refunds may be obtained for overpayments made on or after November 9, 1981. Producers who believe they filed notice with MMS prior to November 9, 1983, and are therefore entitled to a refund for overpayments made prior to November 9, 1981, should submit to MMS documentation establishing the fact. The producer should also submit an application showing its entitlement to a refund by providing the data required by MMS in its published notices. MMS' determinations of producers' applications shall be made by written decisions appealable through the ordinary appeals process. In the future MMS should not attempt to foreclose lessees' attempts to file refund requests.

MMS' "final order" also stated that those appealing "should include with their notice of appeal a schedule of the royalty payments made after December 1, 1978, that they assert would be subject to refunds but for this decision." 49 FR 47120 (Nov. 30, 1984). Several appellants have objected to this language or made requests to be permitted to later supply additional information because of the limited time for gathering it within the deadline for filing a notice of appeal. It is unclear why the statement was included in the final order. The information described was not necessary to the resolution of the legal issues presented the Board by MMS's decision. It would seem beyond question that appellants paid royalties as required by MMS based on its calculations using FERC Orders Nos. 93 and 93-A. Nor is it

clear what was meant by "a schedule of the royalty payments." Presumably this was intended to require more than just a list of the dates payments were made. In any event, it is not our task to conduct initial review of such information. After MMS has examined the data and documentation supplied by producers in support of their refund requests and has made a decision as to the amount a producer is entitled to receive, and after MMS appeal procedures have been followed, then an appeal may be brought to us. At that time we would review the information to resolve any issues presented to us. Because the requirement stated in the final order was unnecessary, appellants are not to be prejudiced by any information supplied or the absence of such information in presenting their appeals to this Board.

Accordingly, all other arguments of the parties having been considered, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

Franklin D. Arness
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

I concur in the result:

Kathryn A. Lynn
Administrative Judge
Alternate Member.

